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No.

IN THE
Supreme Court of the United States

October Term, 1984

G. M. SHUPE, INC.,
Petitioner,

v.

DRAVO CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

1. Whether a federal court should certify a question of state law to that state's highest court when the question of state law is unsettled, determinative to the federal proceedings, and a misapplication of the state law would conflict with state policy.

LIST OF PARTIES

The caption contains the names of all parties to the proceedings below.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner, G.M. Shupe, respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit which was entered in this proceeding on July 6, 1984.

I.

OPINIONS BELOW

The opinion of the Court of Appeals is unpublished and appears in the appendix hereto. The opinion of the District

Court for the Western District of Washington also appears in the appendix hereto.

II.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on July 6, 1984. This petition for certiorari was filed within 90 days of July 6, 1984. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). Federal jurisdiction is invoked by diversity pursuant to 28 U.S.C. § 1332.

III.

QUESTIONS PRESENTED

1. Whether a federal court should certify a question of state law to that state's highest court when the question of state law is unsettled, determinative to the federal proceedings and a misapplication of the state law would conflict with state policy.

IV.

STATUTORY PROVISIONS INVOKED

RCW 2.60.020, Federal Court certification of local law question:

> When in the opinion of any federal court before whom a proceeding is pending, it is necessary to ascertain the local law of this state in order to dispose of such proceeding and the local law has not been clearly determined, such federal court may certify to the supreme court for answer the questions of local law involved and the Supreme Court shall render its opinion in answer thereto.

V.

STATEMENT OF THE CASE

A. Nature of Proceedings

This action was commenced in state court on March 9, 1982 by the plaintiff to recover $319,757.40 in commissions pursuant to a written employment agreement with defendant. CR 26. The petitioner sought recovery by virtue of breach of contract or, alternatively, unjust enrichment.

The respondent removed to U.S. District Court on grounds of diversity,

demanded a jury, and answered alleging that there had been an accord and satisfaction, novation, release, and that the claim was barred by the statute of liminations, laches, estoppel and waiver. The respondents counterclaimed for attorney fees and costs. Both parties moved for summary judgment. Oral argument was requested but denied. CR 17. On May 5, 1983, the District Court granted summary judgment in favor of the respondent, holding that there had been a subsequent accord and satisfaction of the debt, and that extrinsic evidence could not be considered to explain the "settlement" document. This ruling disposed of petitioner's cross-motion for summary judgment. Other minor claims were also disposed of by summary judgment.

The United States Court of Appeals for the Ninth Circuit affirmed the District Court's decision in a memorandum

opinion filed July 6, 1984 which noted that the question of state law presented by petitioner was indeed "unsettled" in the Washington Supreme Court.

On July 20, 1984 the petitioner filed a motion with the Court of Appeals requesting that it certify a question of state law to Washington State Supreme Court. This motion was denied on August 3, 1984. Because the Court of Appeals' Order denying the petitioner's motion was vague as to the reason for denial, the appellant moved the court to clarify its order; however, that motion was denied on August 23, 1984.

The petitioner, therefore, petitions the Court for a Writ of Certiorari pursuant to 28 U.S.C. § 1254(1).

B. Factual Summary

The trial court, in the order granting respondent's (hereinafter "Dravo") motion for summary judgment, set forth

the basic facts which were undisputed. In fact, Dravo did not submit affidavits in opposition to petitioner's cross-motion for summary judgment.

The parties entered into an employment contract in 1971 which gave the petitioner, G.M. Shupe, (hereinafter "Shupe"), who was the executive vice president of defendant Dravo corporation at that time, a commission for settling claims on construction projects which Shupe had administered while at Dravo. CR 4 (Exhibit A). Among these claims was the "Auld Valley (AV) claim", which is the subject of this litigation. The AV claim was valued by Shupe and Dravo at a par value of $200,000.00 and Shupe was to receive 15% of the recovery above this par figure. CR 4.

In the fall of 1972 Dravo officials announced to Shupe that AV would be taken

out of this contract. CR 29 (Para. 15). Shupe had worked on the claim with his staff for several years at this time. Shupe ultimately recognized Dravo's right to remove him from the management of the claim but never agreed to give up his commission (CR 29 Para. 18).

By July, 1975, the bulk of the remaining claims work had been completed by Shupe and he met with officials of Dravo to settle up on commissions which were then due. Shupe received $195,000.00 for commissions on 5 claims. CR 29 Para. 28. At this time, Dravo would not consider or discuss the settlement of the AV claim for two reasons: (1) the claim had not yet been settled (and therefore Shupe might not have been entitled to anything), and (2) the claim had been taken from him in 1972. CR 29 (Para. 26). Shupe accepted the $195,000.00 in full satisfaction of all

commissions then due, terminated his activities associated with the contract, and awaited the settlement of the AV claim, which occured in late 1979. When Shupe submitted his claim for compensation it was rejected and he filed suit. Both parties moved for summary judgment.

Shupe asserted in an uncontroverted affidavit (CR 29) that:

(1) both parties did not intend, by the July 1975 letter, to settle the AV claim;

(2) there was no consideration for the settlement of the AV claim; the money that was received was for 5 specific claims not including Auld Valley;

(3) the AV claim was not considered during the negotiations surrounding the signing of the 1975 letter; and

(4) in 1975 the AV claim was still contingent, therefore no debt existed which could have been satisfied.

The District Court gave no effect to Shupe's assertions and strictly construed the letter using the "mechanical test" as an accord and satisfaction; a portion of the letter states as follows:

> It is further agreed that in consideration of the payment of Dravo to G. M. Shupe, Inc., of $195,000.00 that all compensation due G.M. Shupe, Inc. under said agreement is hereby satisfied and neither party shall have any rights to recourse against the other with respect thereto, or any matter mentioned therein, except as hereinafter noted.

The District Court held, CR 40 at p.10, that this language was "unambiguous on its face" and that "parol evidence is therefore inadmissable to prove that neither Shupe nor Dravo intended to settle the AV matter in the 1975 agreement."[1]

---

[1]The petitioner, G. M. Shupe, Inc., is not a parent or subsidiary corporation for or to any other corporation.

VI.

REASONS FOR GRANTING THE WRIT

1. **The United States Court of Appeals for the Ninth Circuit's Denial of the Petitioner's Motion to Certify a Question of Local Law to the Washington State Supreme Court Conflicts in Principle With Notions of Federalism and Erie v. Thompkins. 304 U.S. 64, 58 S. Ct. 817, 114 A.L.R. 1487 (1938)**

Under Swift v. Tyson, 41 U.S. 1, 16 Pet. 1 (1842), a federal court, with jurisdiction based on diversity was free to exercise an independent judgment in matters of "general" jurisprudence, or when faced with the application of "state common law." However, in Erie v. Thompkins, 304 U.S. 64, 58 S. Ct. 817, 114 A.L.R. 1487 (1938) the Supreme Court overruled Swift and held as follows:

> Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not

> a matter of federal concern. There is no federal general common law.

(Id. at 78, 58 S. Ct. at 822).

It is clear under Erie that where there is state authority which clearly answers the questions of state law involved, that state law must prevail, and a federal court may not make any independent determination. West v. American Telephone & Telegraph Co., 311 U.S. 223 (1940). Erie compels a federal court to reach as near an identity of outcome as possbile to the probable outcome in the state court.

Historically, this interpretation of Erie gave rise to the "abstention doctrine", whereby a federal court faced with the task of deciding an unsettled issue of state law would defer its decision on the matter until the State Supreme Court had an opportunity to rule on the unsettled issue of state law.

While the abstention doctrine fits comfortably with the view that Erie demands something closely approaching an identity of result, whether the suit be brought in state or federal court, abstention erodes the purpose for which Congress created federal diversity jurisdiction. Despite the apparent problems, this Court approved abstention in certain cases in which the application of an unsettled state law was determinative in an action properly within federal jurisdicton. In Railroad Commission of Texas v. Pullman Co., 312 U.S. 496 at 499-500 (1840) this Court ruled as follows:

> . . .no matter how seasoned the judgment of the district court may be, it cannot escape being a forecast rather than a determination. The last word on [state law] . . . belongs neither to us nor to the district court but to the [state Supreme Court] . . . In this situation a federal court . . . is

> asked to decide an issue by making a tentative answer which may be displaced tomorrow by a state adjudication . . . The reign of law is hardly promoted if an unnecessary ruling of a federal court is thus supplanted by a controlling decision of a state court.

The Pullman decision exemplifies this Court's concern in upholding the Erie doctrine and promoting the notion of federalism. However, abstention is not the solution to the conflict between federal diversity jurisdiction and the premises of Erie. This Court recogized the inherent problems with abstention in Meredith v. Winter Haven, 320 U.S. 228 (1943). In Meredith, the Supreme Court reversed a federal court's abstention in a diversity case and stated:

> [D]ifficulties of ascertaining . . . state law . . . do not in themselves afford a sufficient ground for a federal court to decline to exercise its jurisdiction to decide a case which is properly brought to it for a decision.

> The diveristy jurisdiction was not conferred for the benefit of the federal courts or to serve their convenience. Its purpose was generally to afford to suitors an opportunity . . . to assert their rights in the federal rather than in the state courts.

The conflict remains intact; should a federal court be allowed to "forecast" its interpretation of an unsettled state law and thereby risk conflicting with the states interpretation of the same unsettled law, or should the federal court abstain from deciding the unsettled state law and thereby risk the errosion of its diversity jurisdiction.

The conflict, while it remains intact, is not irreconcilable. Many states, including Washington, have provided the procedure which can remedy the federal courts' uncertainty as to an unsettled issue of state law by adopting the Uniform Certification of Questions of Law Act. RCW 2.60.020 states:

> When in the opinion of any federal court before whom a proceeding is pending, it is necessary to ascertain the local law of this state in order to dispose of such proceeding and the local law has not been clearly determined, such federal court may certify to the Supreme Court, for answer to the question of local law involved and the Supreme Court shall render its opinion in answer thereto.

In the present case, the petitioner moved the court below to utilize RCW 2.60.020 and certify the following question to the Washington State Supreme Court:

> Whether under Washington state law extrinsic evidence is admissible for the purpose of showing that a written contract, unambiguous on its face, was not intended by the parties to be the complete agreement between them.

However, the court below denied the petitioner's motion and decided instead to give substantial deference to the District Court's forecast as to the correct Washington State law, even though the Ninth Circuit ruled that the Washington State law was unsettled. The

Ninth Circuit in its memorandum opinion ruled as follows:

> The Washington state courts are split between the "intent" approach, which would admit extrinsic evidence despite a lack of ambiguity in a contract, and the "four corners" or "mechanical" rule, which would not. As recently as last year, the Washington Court of Appeals could not say which approach was authoritative in the State. Brust v. McDonald's Corp., 34 Wash. App. 199, 205, 660 P.2d 320, 323 (1983). After canvassing the cases, we see no reason to disturb the district court's conclusion that the four corners approach is the proper statement of the law in Washington.

The Ninth Circuit should have certified the issue of extrinsic evidence to the State Supreme Court; its failure to do so conflicts in principle with standard notions of federalism and with the premises of Erie.

These conflicts in principle justify the granting of certiorari to review the judgment below.

2. The Decision of the Ninth Circuit Raises Significant and Recurring Problems Concerning the Conflict Between Federal Diversity Jurisdiction, and Standard Notions of Federalism and the Premises of Erie v. Thompkins

Federal courts must not be allowed to forecast what rule of law a state court would adopt. To allow such forecasting threatens not only the premise of Erie v. Thompkins, 304 U.S. 64, 58 S. Ct. 817, 114 A.L.R. 1489 (1938), but more importantly threatens our constitutionally based notions of federalism. However, this Court must also be concerned with the possible errosion of federal diversity jurisdiction.

A compromise must be made, and the certification procedure affords such a compromise. However, to achieve this compromise, concessions will have to be made.

Presently, lower federal courts appear to have broad discretion as to

which state law issues they will certify; such broad discretion has not resulted in uniform treatment. For example, had the present case been before the Fifth Circuit the petitioner's motion to certify the issue of state law would most likely have been granted. See Green v. American Tobacco Co., 304 F.2d 70 (5th Cir. 1962). Is one state more deserving than another to decide its own laws? The answer is clearly no.

Therefore, the lower federal courts are in need of guidance. Just as the Supreme Court provided guidance to the lower federal courts regarding abstention, so too should the Supreme Court provide guidance to the lower federal courts regarding certification.

While the petitioner acknowledges that certification is a form of federal court abstention, the difference in the degree of abstention set forth in Pullman

is so significant that the problems associated with abstention are not associated with certification. Furthermore, as was previously discussed, concessions must be made to achieve a balance between preserving the premises of Erie and notions of federalism, while at the same time preserving the integrity of federal diversity jurisdiction. Certification does not unduly delay the federal proceedings, and certification does not deprive the federal court of jurisdiction as was often the result with abstention because the action was fully litigated in state court and therefore any further action would be precluded by res judicata. In fact, appeals might be eliminated if a clear guide set forth the proper procedures for certification.

The Ninth Circuit's denial of the petitioner's motion to certify a question of local law to the Washington Supreme

Court deprived the State of Washington of an opportunity to decide whether, under Washington law, extrinsic evidence is admissible to determine the intent of the parties in a contract. The Ninth Circuit's denial of the petitioner's motion to certify cannot be justified with the premises of Erie and notions of federalism.

These significant and recurring problems concerning certification of questions of state law by lower federal courts justify the granting of certiorari to review the judgment below.

3. The Ninth Circuit Erred When it Denied the Petitioner's Motion to Certify the Question of Local Law to the Washington State Supreme Court

Throughout this petition the petitioner has alluded to several concerns associated with the certification procedure. Alleviating these concerns provides practical guidance for the lower

federal courts so that they may more uniformly determine which issues of state law require certification to the State Supreme Court.

To preserve the premises of Erie and notions of federalism, certification should be sought under the following circumstances:

> 1) when the state law question appears to be unsettled, or deals with an area of law which is undergoing significant development;
> 2) when the state law question has an important impact on the determination of the federal proceedings;
> 3) when a misapplication of the state law will result in a decision which conflicts with state policies, and
> 4) when the comparative length of time required to obtain a decision from the state court will not grossly disrupt the normal appellate process.

West's Federal Court of Appeals Manual, West Publishing, Section 20.3 (1981).

In the petitioner's motion to the Ninth Cicuit requesting it to certify a question of state law, the petitioner asserted that the criteria above were

applicable and determinative, and further the petitioner asserted that question to be certified met the above criteria.

To exemplify the lower federal court's need for guidance in determining which questions of state law to certify, as was previously mentioned, if the present case were brought in the Fifth Circuit the petitioner's motion to certify would most likely be granted.

In Green v. American Tobacco Co., 325 F.2d 673 (1963), the Fifth Circuit certified the following question to the Florida State Supreme Court:

> Does the law of Florida impose on a manufacturer and distributor of cigarettes absolute liability, as for breach of implied warranty, for death caused by using such cigarettes from 1924 or 1925 until February 1, 1956, the cancer having developed prior to February 1, 1956, and the death occurring February 25, 1958, when the defendant manufacturer and distributor could not on, or prior to, February 1, 1956, by the reasonable application of human skill and foresight, have known that users of such cigarettes would be endangered, by the inhalation of the main stream

> smoke from such cigarettes of contracting cancer of the lung?

154 So.2d at 170.

The Fifth Circuit's decision to certify the above question was based on their desire to give the proper deference to the State of Florida. The question in Green, supra, was unsettled and furthermore the area of products liability was undergoing a transformation, one which, if adopted, would create the plaintiff's right to recovery. The questions in Green, supra, had an important impact on the determination of the federal proceedings. The question in Green, supra, was such that if the Fifth Circuit had misapplied the Florida law it would conflict with important state policies by depriving the plaintiff of her recovery. And finally the certification procedure of the Florida court did not unduly delay the federal proceedings. The question in Green, supra, was a proper question to be certified.

Likewise, the question in the present case is a proper question to be certified.

The Ninth Circuit should have certified the following issue, which is a state law question, to the Washington Supreme Court:

> Whether under Washington state law extrinsic evidence is admissible for the purpose of showing that a written contract, unambiguous on its face, was not intended by the parties to be the complete agreement between them.

a. <u>The state law question is unsettled and is undergoing a transformation</u>

The memorandum opinion filed by the Ninth Circuit recognized that the pivitol issue of plaintiff's case is not settled by Washington law. (Memorandum Opinion P.2, attached hereto as Appendix B.) And yet the Ninth Circuit affirmed the district court's application of the "mechanical" rule as to the admissibility of parol evidence which prevented

consideration of the petitioner's uncontroverted evidence supporting its claim.

The petitioner argued in its brief that the "intent" test was the proper rule and cited in support of that proposition cases from all three divisions of the State Court of Appeals (the intermediate appellate court) which adopted that test and some supportive language found in some opinions of the Washington Supreme Court, e.g., Barber v. Rochester, 52 Wn.2d 691, 328 P.2d 711 (1958). There is no clear and definitive State Supreme Court opinion.

Furthermore, the Washington rule as to the admissibility of extrinsic evidence is undergoing a transformation. More recent Washington appellate court opinions strongly support the "intent" approach which is supported by most legal scholars. Shattuck, Contracts in Washington, 1937-1957: Part II, Wash. L. Rev. 345 (1959).

Barovic v. Cochran Electric, 11 Wn. App. 563, 524 P.2d 261 (1974) illustrates the clear support in the appellate courts for the "intent" approach. In Barovic, at 564-65, the Washington Court of Appeals reversed a trial court's dismissal, on motion for summary judgment, of a contract claim because the trial court relied exclusively upon a written "agreement" contract and did not consider all the surrounding evidence:

> The trial court concluded that the purchase order was the complete contract; that parol evidence is not admissible to vary the terms of a written contract and therefore there was no material issue of fact to be decided. It granted Cochran Electric's motion for sumary judgment. Barovic appeals. We reverse.
>
> The object and function of the summary judgment procedure is to avoid a useless trial; however, a trial is not useless but is absolutely necessary where there is a genuine issue as to any material fact. Preston v. Duncan, 55 Wn.2d 678, 349 P.2d 605 (1960).
>
> In Diel v. Beekman, 1 Wn. App. 874, 879, 465 P.2d 212 (1970), we held:
>
> > [T]he legal basis for the parol evidence rule is the theory of integration. A writing intended to

> supercede earlier and contemporaneous expressions is given that effect. This does not mean, however, that simply because there is a written agreement, other evidence will not be considered as a preliminary matter. . .

Thus, before the parol evidence rule can be applied, the court must hear all extrinsic evidence and determine if the parties intended that the written agreement be the complete integration.

Further, in Lynch v. Higley, 8 Wn. App. 903, 909, 510 P.2d 663 (1973), we approved the statement in 3 A. Corbin, Contracts Section 573 (1950).

> The use of such a name for this rule [parol evidence rule] has had unfortunate consequences, principally by distracting the attention from the real issues that are involved. These issues may be any one or more of the following: (1) Have the parties made a contract? (2) Is that contract void or voidable because of illegality, fraud, mistake or any other reason? (3) Did the parties assent to a particular writing as the complete and accurate "integraton" of that contract?
>
> In determining these issues, or any one of them, there is no "parol evidence rule" to be applied. On these issues, no relevant evidence, whether parol or otherwise, is excluded. No written document is sufficient, standing alone, to determine any one of them, however long and detailed it may be, however formal, and however many may be the seals and signatures and assertions. No one of these issues can be determined by mere inspection of the written document.

This is precisely what happened to Shupe in this case: he was not heard on his claim despite his uncontroverted evidence that Auld Valley was intended by both parties to be settled by the 1975 letter.

Another endorsement of the "intent" test is found in James S. Black & Co. v. Charron, 22 Wn. App. 11, 16, 587 P.2d 197 (1978):

> The courts also look to the intention of the parties as to whether there has been and accord and satisfaction. Generally, the important question is whether there was a meeting of the minds as to a genuine compromise, arrived at through mutual agreement, and not "fallen into inadvertently".

Although there are in older cases occasional deviations from the intent test, it is firmly the established in the intermediate appellate courts in Washington. Peter Pan Seafoods, Inc. v. Olympic Foundry Co., 17 Wn. App. 761, 565 P.2d 819 (1977); Barovic v. Cochran Electric

Co., 11 Wn. App. 563, 524 P.2d 261 (1974); Lynch v. Higley, 8 Wn. App. 903, 510 P.2d 663 (1973); and Diel v. Beekman, 1 Wn. App. 874, 465 P.2d 212 (1970); Dix Steel Co. v. Miles Construction Co., 84 Wn.2d 114, 443 P.2d 532 (1958); Becker v. Lagerquist Bros., 55 Wn.2d 425, 348 P.2d 423 (1950); Spokane Helicopter Service v. Malone, 28 Wn. App. 377, 623 P.2d 717 (1981); Brust v. McDonald's Corp., 324 Wn. App. 199, 205, 660 P.2d 320 (1983); Thornton v. Interstate Securities Co., 36 Wn. App. 19, 666 P.2d 370 (1983).

The overwhelming weight of authority suggest that the Washington Supreme Court would follow the "intent" approach. Clearly the Washington law is undergoing significant transformation.

b. The state law question would have an important impact on the determination of the federal proceedings

Whether Washington law permits the admission of parol evidence was very much

at issue. Shupe claims that the AV claim was not specifically part of the letter agreement of July 1975, but rather was left for resolution when Dravo ultimately settled the claim. CR 29, P.6. There is uncontroverted testimony (by affidavit) from Shupe that both parties did not intend the July 1975 letter to settle the AV claim. (CR 29).

The intent test would allow Shupe's testimony to aid in the interpretation of the agreement even though there may be no apparent ambiguity.

The intent test allows parol evidence to aid in the interpretation of an agreement even if there is no ambiguity. Brust, supra. As the Washington Supreme Court stated in Barber v. Rochester, 52 Wn.2d 691, 328 P.2d 711 (1958):

> People have the right to make their agreements partly oral and partly in writing, or entirely oral or entirely in writing; and it is the court's

> duty to ascertain from all the relevant evidence, either oral or written, whether the entire agreement has been incorporated in the writing or not. That is a question of fact.

(emphasis added).

If Shupe's testimony is admissible then the question of whether the parties intended the July 1975 agreement to include the AV claim would exist as an issue of fact for a jury to determine, and Dravo's summary judgment could not be granted.

The Ninth Circuit conceded that it was not clear which approach would have been proper, yet it allowed the trial court to utilize the "mechanical test". In view of this uncertainty, certification would have clearly established the proper test.

c. The misapplication of the state law by the federal court will result in a decision which conflicts with state policies

It is clear that the "mechanical" test is in disfavor with virtually all

the legal scholars writing on the subject and all current appellate opinions in the State of Washington. The Supreme Court has not yet, however, clearly endorsed the "intent" test.

If the State Supreme Court does adopt the "intent" test then the federal court's adoption of the "mechanical" test will be in direct conflict with an important state policy; that policy being that people can make contracts as they choose, either as a verbal agreement, a written agreement, or a combination of agreements.

d. Certification to the Washington State Supreme Court will not disrupt the appellate process

The Supreme Court of Washington has been very receptive to previous certified questions of local law. Expressing the importance of RCW Chapter 2.60 the court states as follows:

> The Local Law Certification Procedure Act synthesizes a dual court system and removes one of the problems of the system, that of maintaining uniformity, in the law." In re Elliot, 75 Wn.2d 601, 616, 446 P.2d 347 (1968).

The Supreme Court of the State of Washington will accept certified questions from federal courts if 1) there is no state decision or decisions in the state in conflict, and 2) the certified question does not involve a federal constitutional question. In re Elliot, supra at 617.

The question to be certified in the present case would be accepted for certification by the Washington State Supreme Court.

Certification of a state law question to the Supreme Court of Washington will not disrupt the appellate process because the certification is less time consuming than other procedures available to appellant.

The question presented by the petitioner in the present case should have been certified by the Ninth Circuit to the Washington Supreme Court.

The Ninth Circuit's error in denying the petitioner's motion to certify a question of state law to the Washington Supreme Court justifies the granting of certiorari to review the judgment below.

VII.

CONCLUSION

The petitioner respectfully requests this Court to grant its petition for a writ of certiorari. The granting of this petition is necessary so that the court may preserve the premises of Erie and the notions of federalism. Such notions were well articulated by Walter Lippman, New York Herald Tribune, June 2, 1936:

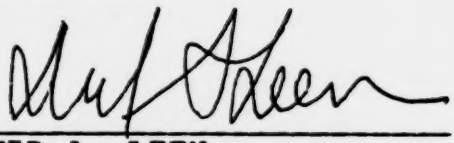
> For the great virtue of the Federal system is that each state becomes . . . a laboratory in which [each of] the

> other . . . States can see how theories actually work when put into practice. No one state . . .can injure the nation as a whole and the follies of one state are almost certain to teach wisdom to the others . . .

This petition presents questions which are basic to our constitution and therefore this petition should be granted.

Respectfully submitted this 4th day of October, 1984.

LEEN & MOORE

By 

DAVID A. LEEN
Attorney for Petitioner

APPENDIX A

Filed in the
United States District Court
APR 14 1983

BRUCE RIFKIN, Clerk
By_____Deputy

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

G. M. SHUPE, INC., a Washington corporation, Plaintiff, v. DRAVO CORPORATION, a Pennsylvania corporation, Defendant.	) NO. C82-340R) ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

THIS MATTER comes before the court on defendant Dravo Corporation's motion for summary judgment. Three grounds are asserted as independent bases for this relief: (1) an alleged September 1972 release; (2) an alleged July 1975 accord and satisfaction; and (3) the statute of limitations. Because the court agrees with defendant that the parties' July 11, 1975 agreement constituted an accord and satisfaction, and that that agreement is

unambiguous and not subject to alteration by parol evidence, disposition of defendant's other arguments is unnecessary. The relevant facts reveal the following:

G.M. Shupe began working for defendant in 1964. In 1971 Shupe's duties included processing thirteen claims on defendant's construction projects. In March 1971 Shupe entered into a contract with defendant concerning Shupe's compensation for negotiation of claims for defendant. The contract provided that, as to the Auld Valley claim ("AV claim"), which is the subject of this lawsuit, Shupe would be paid 15% of the total settlement of the claim over an agreed-upon "par" value of $200,000. The "par" value represented what the parties thought the claim would yield. In 1979 Dravo settled the AV claim for $2.3 million.

On April 5, 1972 the contract was altered to make G. M. Shupe, Inc. the

recipient of all compensation; at the same time Shupe resigned as an officer of Dravo. On September 6, 1972 Shupe met with Dravo's Ed Lore in Bellevue, Washington. On September 8, 1972 Lore sent Shupe a letter wherein Lore outlined various items that had been discussed at the September 6 meeting and Lore's understanding of the agreements reached. This letter provided in pertinent part:

> 3. We reviewed the status of all WCD claims in detail and agreed:
>
> . . .
>
> b) you will withdraw from any Auld Valley project claim activity and relinquish any rights to remuneration if Dravo successfully negotiates a settlement of any claim related to this project. I agree to reconsider this matter should you, after discussion with Larry Campbell, convince me that your withdrawal is not to the best interests of Dravo.

Exh. 3 to Shupe deposition (Nov. 9, 1982). Shupe signed and returned to Dravo a signed copy of Lore's September 8

letter, as shown by Shupe's forwarding letter of September 11 to Lore, which states in full:

> Confidential
>
> Mr. H. Edgar Lore, Exec. V.P.,
> Dravo Corporation
> One Oliver Plaza
> Pittsburgh, Penn. 15222
>
> Dear Sir:
>
> Attached is a signed copy of your letter of September 8th., pertaining to the Dravo-Shupe Contract.
>
> Itsm [sic] 3-B is not entirely within my understanding. However you have agreed to reconsider if Campbell and I are successful in convincing you that we should handle this negotiation. I feel confident that you will agree with our sales pitch.
>
> Sincerely yours,
> G.M. SHUPE, INC.
>
> /s/G.M. Shupe
> President

Id. Exh. 4.

Lore was ultimately not convinced by Shupe's sales pitch, and indicated in his letter of April 24, 1973 to Shupe that he

found no basis for reconsideration of the September 8, 1972 agreement which, according to Dravo, terminated Shupe's participation in the AV project. Id. Exh. 5.

Shupe continued between 1972 and 1975 to send periodic invoices to Dravo listing the status of each claim. Auld Valley and Homer Spit were listed on Shupe's April 30, 1975 invoice as having zero settlement value to date. Exh. 4 to Shupe Aff. (Jan. 24, 1983). In July 1975 Shupe and Lore met to settle on the amount due Shupe on claims covered by the April 5, 1972 contract. Shupe made an offer to settle Auld Valley for $30,000 but Lore would not recognize Shupe's asserted right to compensation for that claim and assigned a value of zero to that claim. Shupe deposition at 122-23.

At that time, the amount that would ultimately be received on the Homer Spit and Dworshak Dam claims was also not known.

On July 11, 1975 Lore sent Shupe a letter which stated in full as follows:

> Mr. G. M. Shupe
> G. M. Shupe, Inc.
> P.O. Box 2145
> Spokane, Washington 99210
>
> Dear Mr. Shupe:
>
> On April 5, 1972 G.M. Shupe, Inc. and Dravo Corporation entered into an agreement whereby G.M. Shupe, Inc. would prosecute certain contract claims as noted therein and be compensated according to the terms thereof.
>
> The Agreement was to terminate July 31, 1973 unless extended from month to month by mutual agreement, which it has been. It is now agreed between us that the above referenced agreement will be terminated at of June 30, 1975.
>
> It is further agreed that in consideration of the payment by Dravo to G.M. Shupe, Inc. of $195,000.00 that all compensation due G.M. Shupe, Inc. under said agreement is hereby satisfied and neither party shall have any rights or recourse against the other with respect thereto, or any matter mentioned therein, except as hereinafter noted.

> With respect to Homer Spit Project it is agreed that the provision of the agreement pertaining thereto shall remain in effect until the Alaska Supreme Court makes a decision in the matter except that if a trial de novo is ordered, Dravo reserves the right not to proceed further.
>
> Further, with respect to the financing claim filed by DDC with the Corps of Engineers [re Dworshak Dam], it is agreed that should such claim be successful, Dravo and G.M. Shupe, Inc. will agree on a proper prorata payment to G.M. Shupe, Inc. as said claim relates to the claims participated in by G.M. Shupe, Inc., and for which compensation was paid under the terms of the April 5, 1972 Agreement.
>
> Sincerely,
>
> /s/ H.E. Lore
>
> Accepted by:
>
> /s/ G.M. Shupe

Exh. 6 to Shupe deposition. Plaintiff acknowledged signing the July 11 letter and forwarding it with his July 25, 1975 reply, which stated in pertinent part:

> I am returning the signed copy of your letter of July 11, 1975, pertaining to the G.M. Shupe-Dravo Contract and settlement terms.

> I am enclosing a detailed settlement analysis for your concurring signature that might be of value to you in explaining all transactions since there were offsets in the negotiation and final settlement amount so as to clear the matters included and to fully identify the outstanding amount agreed upon. We have summarized all the items as they have been reviewed with Clyde Slease.
>
> . . . .
>
> This is total settlement of outstanding monthly invoices from G.M. Shupe, Inc. through June 30, 1975 and all earned bonus payments excepting those identified in the Dravo letter dated July 11, 1975.

Id. Exh. 7.

In late 1980 Shupe learned that the Auld Valley claim had been settled and requested compensation from Dravo. Payment was refused and, on March 9, 1982, the complaint herein was filed in King County Superior Court. Defendant removed to this court on March 25, 1982 on the basis of diversity of citizenship of the parties.

The issue is whether the July 11, 1975 agreement settling all compensation due to Shupe under the April 5, 1972 contract encompassed the AV claim. Plaintiff's position is that the July 11, 1975 agreement settled all pending claims to that date except Auld Valley. Plaintiff argues that the $195,000 paid in settlement of money already due under the April 5, 1972 contract could not constitute consideration for the giving up of sums that had not yet accrued. Plaintiff further argues that, because the terms of an accord and satisfaction are to be strictly construed, and the July 11, 1975 agreement did not expressly settle the AV claim, the AV claim is not encompassed by the July 11, 1975 agreement. Plaintiff also maintains that, because defendant consistently took the position that Auld Valley was removed from the parties' agreement in 1972, defendant must be

estopped from saying that they settled the AV claim in 1975.

The court cannot agree with plaintiff's statement that "a settlement or accord and satisfaction cannot occur unless the damages have occurred or are known." Memorandum (Jan. 24, 1983) at 9. The cases cited do not so hold. See Plywood Marketing Associates v. Astoria Plywood Corp., 16 Wn. App. 566, 574-75 (1976), review denied, 88 Wn.2d 1014 (1977) (fraud discovered in 1970 could not have been contemplated by a 1969 settlement); Blockhead, Inc. v. Plastic Forming Co., 402 F. Supp. 1017, 1023-24 (D. Conn. 1975) (issue "not mentioned" in very specific settlement document not covered thereby). None of the cases cited by plaintiff hold that an unliquidated claim cannot be the subject of an accord and satisfaction. See Puget Sound Pulp & Timber Co. v. O'Reilly, 239 F.2d

607, 610 (9th Cir. 1957) (claim "not discussed" was not terminated by accord and satisfaction); Louis Schlesinger Co. v. Kresge Foundation, 388 F.2d 208, 210 (3d Cir.), cert. denied, 391 U.S. 934 (1968) (settlement did not encompass transaction that had "not yet come into existence"); Bellingham Securities Syndicate, Inc. v. Bellingham Coal Mines, Inc., 13 Wn.2d 370, 385-86 (1942) (past consideration will not support accord and satisfaction); Grant v. Aerodraulics Co., 199 P.2d 745, 749-50 (Cal. Dist. Ct. App. 1948) (same); Brear v. Klinker Sand & Gravel Co., 60 Wn.2d 443, 446 (1962) (plain meaning of language used was controlling).

"[A]n accord and satisfaction consists of a bona fide dispute, an agreement to settle that dispute, and performance of that agreement." Perez v. Pappas, 98 Wn.2d 835, 843 (1983). The

evidence in this case establishes that a bona fide dispute existed between the parties regarding whether plaintiff was entitled to compensation on the AV claim. Despite Shupe's signature on the September 8, 1972 letter withdrawing the AV claim from Shupe's control, Shupe maintained that he was entitled to compensation on that claim. His affidavit avers that the original of the September 8, 1972 letter that he signed contained a handwritten notation that he did not agree to item 3(b). The original document cannot be found. Shupe's September 11, 1972 transmittal letter, however, tends to show that Shupe agreed to renounce the AV claim provided he had an opportunity to persuade Ed Lore to reconsider. See Exh. 4 to Shupe deposition. On April 24, 1973 Lore wrote Shupe stating that he declined to reconsider the

September 8, 1972 agreement. Shupe continued to invoice Dravo for the AV claim. In December 1974 Shupe wrote to Lore indicating that if there existed a difference in the parties' thinking regarding their agreement "it should be disclosed at this time so that our company or Dravo are not being misled." Id. Exh. 14. Lore responded on January 3, 1975 that Dravo "continue[s] to hold the position that G.M. Shupe, Inc. is not involved [in the AV claim]". Id. Exh. 15.

At the time of the 1975 settlement negotiations, a genuine dispute existed between Shupe and Dravo over compensation for the AV claim. Shupe stated in deposition:

> Q Now, between December 24 of 1974 and July 11 of 1975, did you and Mr. Lore have any discussions on the subject of Auld Valley?

A When we worked out the settlement amount, we had a lot of discussions about Auld Valley.

Q What did you discuss in connection with Auld Valley when you worked out the settlement amount?

A Mr. Lore maintained the position that Auld Valley was not part of the contract, that he had unilaterally removed it from the contract. He said the contract of April 5 had been modified by him, April 5, 1972, had been modified and it wasn't for consideration. I had--and I have notes on this meeting--I had made an offer of I think it was $30,000 to settle out for damage consideration for Auld Valley, that I would take $30,000 for our consideration on Auld Valley. Mr. Lore would not recognize that as being a position at all. He only assigned zero to it, and a couple other claims also he did that to.

At 122-23. It is clear that Auld Valley was the subject of settlement negotiations.

What is the effect of the July 11, 1975 agreement? The court is of the opinion that it means what it says, "that in consideration of the payment by Dravo to

G.M. Shupe, Inc. of $195,000.000 . . . all compensation due G.M. Shupe, Inc. under [the April 5, 1972] agreement is hereby satisfied and neither party shall have any rights or recourse against the other with respect thereto [i.e., with respect to the agreement], or any matter mentioned therein . . . ." Shupe himself identified the July 11, 1975 agreement as the "total settlement of outstanding monthly invoices from G.M. Shupe, Inc. through June 30, 1975 and all earned bonus payments excepting those identified in the Dravo letter dated July 11, 1975 [i.e., excepting the Homer Spit project and Dworshak Dam claims]." Exh. 7 to Shupe deposition.

It is undisputed that Auld Valley was included in the April 5, 1972 agreement as an item for which Shupe would be entitled to compensation. It is also plaintiff's assertion that Auld Valley

was included on monthly invoices. The fact that Homer Spit and Dworshak Dam were treated by the July 11, 1975 agreement, despite their then contingent status, tends to refute plaintiff's argument that the agreement contemplated only liquidated claims. The absence of an explicit reference to Auld Valley is consistent with defendant's position since 1972 that plaintiff was entitled to nothing on Auld Valley; if defendant had conceded liability on Auld Valley the AV claim would have been excepted from the settlement in the way Homer Spit and Dworshak Dam were.

Plaintiff asserts that, because each party believed Auld Valley was not part of the 1975 agreement for a different reason, mutual mistake should bar the inclusion of Auld Valley in the settlement.

> When a release is in plain and unambiguous language, as is the release in this case, we have said that: (a) Before a plain, unambiguous instrument can be set aside on the ground of mutual mistake, the evidence must be clear and convincing. Spratt v. Northern Pac. Ry., 90 Wash. 592, 156 Pac. 563 (1916). (b) The courts will not interpret the meaning of unambiguous contracts. Silen v. Silen, 44 Wn.2d 884, 271 P.2d 674 (1954). (c) Where a release contains plain and unambiguous language, parol evidence will not be admitted to vary the release, Betcher v. Kunz, 112 Wash. 563, 192 Pac. 955 (1920); unless the release was induced by fraud, false representations or overreaching. Reynolds v. Day, 93 Wash. 395, 161 Pac. 62 (1916).

Pepper v. Evanson, 70 Wn.2d 309, 313 (1967). This court finds the July 11, 1975 agreement unambiguous on its face. Parol evidence is therefore inadmissable to prove that Dravo did not intend to settle the AV matter in the 1975 agreement. If plaintiff erroneously believed that Auld Valley was not settled its mistake was unilateral. Not only does the July 11, 1975 agreement conclude the parties' rights with respect to the April

5, 1972 contract, plaintiff's July 25, 1975 reply letter so acknowledges without any mention of Auld Valley.

Finally, plaintiff's argument that defendant must be estopped from taking the position that the July 11, 1975 agreement settled the AV claim is without merit. Plaintiff testified in his deposition that Dravo consistently maintained that plaintiff was not entitled to anything for Auld Valley because of the September 8, 1972 modification. Dravo so maintains in this court. Defendant is not estopped from settling a claim that is disputed simply because it refuses to recognize a right in plaintiff to any compensation. That is precisely the function of settlements.

In sum, a bona fide dispute existed between the parties in July 1975 over whether plaintiff was entitled to compensation for the Auld Valley claim. The

parties executed an unambiguous agreement supported by consideration settling that dispute. See United Truck Lines, Inc. v. Employers Mutual Casualty Co., 44 Wn.2d 520, 525 (1954). The agreement contains plain and unambiguous language that cannot be varied by parol evidence. The agreement was performed. Defendant is entitled to summary judgment dismissing plaintiff's claim for compensation.

IT IS SO ORDERED.

The Clerk of the Court is directed to send uncertified copies of this Order to counsel of record.

DATED at Seattle, Washington this 14th day of April, 1983.

/s/
BARBARA J. ROTHSTEIN
UNITED STATES DISTRICT JUDGE

APPENDIX B

FILED
JUL 6 1984
PHILLIP B. WINBERRY
CLERK, U.S. COURT OF APPEALS

UNITED STATE COURT OF APPEALS
FOR THE NINTH CIRCUIT

G. M. SHUPE, INC., a Washington corporation, Plaintiff-Appellant,	)	NO. 83-3881
v.	)	D.C. No.
DRAVO CORPORATION, Pennsylvania corporation, Defendant-Appellee.	)	C82-340R
	)	MEMORANDUM

Appeal from the United States District Court for the Western District of Washington, Barbara J. Rothstein, District Judge, Presiding
Argued and Submitted April 5, 1984

Before: BROWNING, Chief Judge, CANBY, Circuit Judge, and CROCKER*, District Judge.

The panel has concluded that the issues presented by this appeal do not meet the standards set by Rule 21 of the

*Honorable M.D. Crocker, District Judge, United States District Court for the Eastern District of California, sitting by designation.

Rules of this court for disposition by written opinion. Accordingly, it is ordered that disposition be by memorandum, forgoing [sic] publication in the Federal Reporter, and that this memorandum may not be cited to or by the courts of this circuit.

Shupe appeals from summary judgment on his claim for compensation under a contract. We affirm.

The Washington state courts are split between the "intent" approach, which would admit extrinsic evidence despite a lack of ambiguity in a contract, and the "four corners" or "mechanical" rule, which would not. As recently as last year, the Washington Court of Appeals could not say which approach was authoritative in the state. Brust v. McDonald's Corp., 34 Wash. App. 199, 660 P.2d 320, 323 (1983). After canvassing the cases, we see no reason to disturb the district

court's conclusion that the four corners approach is the proper statement of the law in Washington.

Nothing in the 1972 contract or the 1975 settlement agreement supports a finding of ambiguity. The agreement expressly refers to the 1972 contract and states that all compensation due under the contract is satisfied without recourse for "any matter mentioned therein, except as hereinafter noted." Two exceptions are noted, the Homer Spit and Dworshak Dam projects. The Auld Valley matter was not mentioned. Thus, giving the words of the agreement their ordinary meaning, Corbray v. Stevenson, 98 Wash. 2d 410, 415, 656 P.2d 473, 475 (1982), the agreement shows no intent to reserve any matters for future determination save the two exceptions. The agreement is completely integrated and unambiguous.

The fact that a claim is unliquidated will not prevent it from being settled prior to accrual. Any claim, whether disputed and unliquidated or not, may be discharged by accord and satisfaction. Harding v. Will, 81 Wash. 2d 132, 138, 500 P.2d 91, 96 (1972).

Shupe contends that even if the agreement was an attempt to dispose of all claims, it was invalid for want of consideration. He points to the fact that in negotiations leading to the agreement Dravo refused to assign any value to the Auld Valley claim. However, the value of all commissions was discussed in those negotiations. Shupe admitted that adjustments needed to be made, and accepted what Dravo offered. The settlement was not simply a payment of undisputed amounts of money owed but rather an agreement to pay a negotiated

amount to dispose of all liquidated and unliquidated claims. The consideration was each party's agreement to bring the overall dispute to an end. Harding v. Will, 81 Wash. 2d at 138, 500 P.2d at 96.

AFFIRMED.

FILED
NOV 7 1984
ALEXANDER L. STEVAS
CLERK

No. 84-561 (2)

IN THE

Supreme Court of the United States

October Term 1984

G. M. SHUPE, INC.,
Petitioner,

v.

DRAVO CORPORATION,
Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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No. 84-561

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1984

G. M. SHUPE, INC.,
Petitioner,

v.

DRAVO CORPORATION,
Respondent.

**RESPONSE TO
PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

STATEMENT OF THE CASE

On April 12, 1982, the parties entered a contract (hereinafter "Consulting Agreement") under which plaintiff G. M. Shupe, Inc. would assist in the prosecution of 13 construction claims on

behalf of defendant Dravo Corporation. Amended Excerpts, p. 118. (Both the plaintiff corporation and G. M. Shupe, its owner, are referred to herein collectively as "Shupe.") Under the Consulting Agreement, Shupe received a monthly salary of $7,700, reimbursement for all expenses connected with his claims work, a 15 percent markup on all his expenses, plus bonus payments based upon the amounts recovered under the various claims. Amended Excerpts, p. 118.

One of the 13 claims listed in the Consulting Agreement was the Auld Valley claim. Shortly after the Consulting Agreement was signed, Dravo came to the conclusion that because Shupe had very little contact with the Auld Valley project the claim arising out of that project could best be developed by others. On September 7, 1972, after a meeting between the parties, Shupe and Dravo

agreed that Shupe would not participate in the Auld Valley claim. CR 40, p. 2; Amended Excerpts, p. 123. The September 7 letter agreement states:

> [Shupe] will withdraw from any Auld Valley project claim activity and relinquish any rights to remuneration if Dravo successfully negotiates a settlement of any claim related to this project.

Id. Shupe later disputed his agreement and between 1973 and 1975 he and Dravo had an ongoing dispute over whether Shupe was entitled to compensation for the Auld Valley claim. Amended Excerpts, pp. 7-8, 94-95, 99-100. During that time, Shupe continued work on the remaining claims listed in the Consulting Agreement, but at no time after March 1973 did he perform any work on the Auld Valley claim. CR 40, p. 3; Amended Excerpts, p. 86.

In 1975, Dravo desired to divorce itself from any further relationship with Shupe. By this time, Shupe had already

received enormous profits from the Consulting Agreement. CR 29, p.3; Amended Excerpts, pp. 135-41. In July 1975 the parties therefore initiated negotiations to terminate the Consulting Agreement and settle all claims for compensation under the agreement. CR 40, pp. 3-4; Amended Excerpts, pp. 97-100, 142. At that time many of Shupe's claims for compensation under the Consulting Agreement were disputed by Dravo. Amended Excerpts, pp. 97-103. During the July 1975 negotiations, the parties discussed each of their disputes and exchanged offers and counter-offers of settlement. Amended Excerpts, pp. 97-98, 102. Compensation for the Auld Valley claim was one of the items of dispute, and it was negotiated together with the other areas of disagreement. Amended Excerpts, pp. 97-100, 102.

The parties eventually agreed to a settlement amount by discounting several of Shupe's claims and by eliminating several others. The final settlement figure was $195,000.

The parties' settlement was embodied in a letter agreement dated July 11, 1975 which was signed by both parties. Amended Excerpts, pp. 99, 128. The agreement states in full:

> On April 5, 1972 G. M. Shupe, Inc. and Dravo Corporation entered into an agreement whereby G. M. Shupe, Inc. would prosecute certain contract claims as noted therein and be compensated according to the terms thereof.
>
> The Agreement was to terminate July 31, 1973 unless extended from month to month by mutual agreement, which it has been. It is now agreed between us that the above referenced agreement will be terminated as of June 30, 1975.
>
> It is further agreed that in consideration of the payment by Dravo to G. M. Shupe, Inc. of $195,000.00 that all compensation due G. M. Shupe, Inc.

> under said agreement is hereby satisfied and neither party shall have any rights or recourse against the other with respect thereto, or any matter mentioned therein, except as hereinafter noted.
>
> With respect to Homer Spit project it is agreed that the provision of the agreement pertaining thereto shall remain in effect until the Alaska Supreme Court makes a decision in the matter except that if a trial de novo is ordered, Dravo reserves the right not to proceed further.
>
> Further, with respect to the financing claim filed by DDC with the Corps of Engineers [re Dworshak Dam], it is agreed that should such claim be successful, Dravo and G. M. Shupe, Inc. will agree on a proper prorata payment to G. M. Shupe, Inc. as said claim relates to the claims participated in by G. M. Shupe, Inc. and for which compensation was paid under the terms of the April 5, 1972 Agreement.

Amended Excerpts, p. 128 (emphasis added). Dravo thereafter satisfied its obligations under the July 11, 1975 agreement (hereinafter "Release") by compensating Shupe in the amount of

$195,000. CR 29, p. 6. The Auld Valley Project, which was specifically listed as part of the 1972 Agreement, was not reserved as an exception to the Release.

Following termination of the Consulting Agreement, Dravo continued to independently develop the Auld Valley claim, which was finally settled in 1979. CR 4. Shupe learned of the settlement and demanded to be paid a huge commission out of the settlement proceeds. On March 9, 1982, after Dravo refused to pay anything more to Shupe than was required under the 1975 Release, Shupe filed this action for breach of contract and unjust enrichment. CR 1.

Shortly after the lawsuit was filed, Dravo moved for summary judgment. Dravo argued that the Release was unambiguous and barred Shupe's claim for additional compensation. The district court agreed and dismissed Shupe's case. On appeal,

the Ninth Circuit also agreed that the Release barred Shupe's claim and affirmed the dismissal of Shupe's case.

After Shupe had contested and lost his dismissal at both the district and circuit court levels, Shupe for the first time asked that an issue of state law be certified to the Washington Supreme Court. Dravo opposed the motion on three grounds: First, the certification issue framed by Shupe was not dispositive to the district and circuit court decisions; second, Shupe had not raised the certification issue in district court; finally, certification would unduly prolong the litigation. The Ninth Circuit denied Shupe's motion without opinion. Shupe petitions this court to review the Ninth Circuit's denial of this motion.

REASONS FOR DENYING THE WRIT

In his motion for certification, Shupe asked that the Washington Supreme Court choose between the "mechanical" and the "intent" tests for introduction of parol evidence. Under the "mechanical" test, parol evidence is never admissible to add to or contradict the terms of an unambiguous written instrument complete on its face. See, Brust v. McDonald's Corp., 34 Wn. App. 199, 205-06, 660 P.2d 320, 323-24 (1983). In contrast, the "intent" test permits the court to review parol evidence to determine whether a written agreement is an integration, or whether it embodies only a portion of what the parties agreed to. See id.

The Ninth Circuit's denial of certification was proper for three reasons. First, the certification issue framed by Shupe is not dispositive of either the district or circuit court holdings.

Second, the issue was not raised before the circuit court. Third, whether to certify an issue to state court is discretionary; Shupe has not even suggested that the Ninth Circuit abused its discretion.

I.

SHUPE'S CERTIFICATION ISSUE WAS IRRELEVANT TO DISPOSITION OF THIS CASE

After dismissal of his case by the district court and after affirmance by the circuit court, Shupe moved for certification of this issue to the Washington Supreme Court:

> Whether under Washington State law extrinsic evidence is admissible for the purpose of showing that a written contract, unambiguous on its face, was not intended by the parties to be the complete agreement between them.

In propounding this question, Shupe sought a State Supreme Court decision on whether parol evidence is admissible on

the issue of whether an unambiguous written contract is integrated. Shupe suggested that this issue was undecided under Washington law. Yet, regardless of how that issue might be resolved in state court, it would not have affected this case because it is uncontested that the 1975 Release was integrated. The Ninth Circuit's memorandum disposing of Shupe's appeal states, "The agreement is completely integrated and unambiguous." Memorandum, p. 2.

Washington law is and always has been that parol evidence is inadmissible to vary the terms of an unambiguous, integrated agreement.

> It is settled that a fully integrated agreement of a contractual nature may not be varied by extrinsic evidence, written or oral, so as to add to, subtract from, or contradict its provisions.

Lynch v. Higley, 8 Wn. App. 903, 908, 510, P.2d 663, 667 (1973): See Grant County

Constructors v. E. V. Lane Corp., 77 Wn.2d 110, 122, 459 P.2d 947, 954 (1969); Washington Fish & Oyster Co. v. G. P. Halferti & Co., 44 Wn. 2d 646, 658, 269 P.2d 806, 813 (1954) ("The rule is universal that the written contract itself must be resorted to as the source of authority for receiving parol evidence."); Brust v. MacDonald's Corp., 34 Wn. App. 199, 205-06, 660 P.2d 320, 232-24 (1983) (Both the "mechanical" and "intent" tests are applied to determine "whether" the parties intended the written document to be an integration of their mutual agreement").

Not only does Washington Case law prohibit as a general principal the use of parol evidence to create ambiguities in contracts, it applies that prohibition specifically to the interpretation of releases.

> When the release contains plain and unambiguous language, parol evidence will not be admitted to vary the release.

Beaver v. Estate of Harris, 67 Wn.2d 621, 627, 409 P.2d 143, 147 (1965): see Schwieger v. Harry W. Robbins & Co., 48 Wn.2d 22, 24 290 P.2d 984, 986 (1955); Betcher v. Kunz, 112 Wash. 563, 570, 192 Pac. 955, 957 (1920); Spokane Helicopter Service, Inc. v. Malone, 28 Wn. App. 377, 381, 623 P.2d 727, 730 (1981); Pepper v. Evanson, 70 Wn.2d 309, 313, 422 P.2d 817,820 (1967); Metropolitan Life Insurance Co. v. Ritz, 70 Wn.2d 317, 321, 422 P.2d 780, 783 (1967).

There is no issue in this case about the Release being the complete agreement between the parties. Shupe did not--and could not--submit to the district court any evidence to suggest that in 1975 the parties entered any agreements other than the Release. Whether under Washington

law parol evidence is ever admissible to show the existence of agreements collateral to a written agreement, that situation was not present in the case sub judice. Since the issue which Shupe would certify to the Washington State Supreme Court would not have affected the disposition of this case, Shupe's motion for certification was properly denied. See Ormsbee Development Co. v. Grace, 668 F.2d 1140, 1149 (10th Cir. 1982) (where issue is not determinative, certification is not proper).

II

BECAUSE IT WAS NOT RAISED BELOW, THE CERTIFICATION ISSUE WAS NOT AN APPROPRIATE APPELLATE ISSUE

In his appeal, Shupe claimed that the district court adopted the "mechanical" test for using parol evidence, and that it should have instead adopted the "intent" test. Yet this argument was

never made to the district court. Indeed, it was a case cited as authoritative by Shupe which the district court relied upon in rendering its summary judgment decision.

In opposition to defendant's motion for summary judgment, Shupe submitted an affidavit and a memorandum. Nowhere in either pleading did Shupe suggest that the district court should adopt the "intent" rather than the "mechanical" test. Rather, his only argument concerning interpretation of the Release was that the Release might be ambiguous. See Amended Excerpts, pp. 51-52. In his memorandum to the district court, Shupe cited the case of Pepper v. Evanson, 70 Wn.2d 309, 422 P.2d 817 (1967) as authoritative, and quoted specific language from that case. In rendering its decision, the district court quoted and relied upon the very language in Pepper which Shupe had

cited. The district court then found that as matter of law the Release was unambiguous. CR 40, p. 10.

On his appeal, Shupe attempted to argue that Pepper embodied the "mechanical" test and that the district court should not have relied upon it. Shupe attempted to pursue that argument in his motion for certification. Yet, the argument was never made to the district court. It is well settled that theories must be presented to the district court in order to be preserved for appellate review:

> An appellant may not urge as a ground for reversal a theory which he did not present when the case was before the trial court.

Roberson v. United States, 382 F.2d 714, 718 (9th Cir. 1967); see Short v. United Mine Workers of America 1950 Pension Trust, 728 F.2d 528, 532 n.6 (D.C. Cir. 1984) ("[W]e apply the general rule that litigative theories not pursued in the

trial court will not be entertained on appeal."); Seymour v. Coughlin Co., 609 F.2d 346, 348-49 (9th Cir. 1979). The district court ruled upon the theories which Shupe presented. Shupe did not urge the adoption of the "intent" test below and that issue was therefore not one requiring appellate review. The Ninth Circuit's denial of certification was therefore appropriate.

III

CERTIFICATION TO THE WASHINGTON SUPREME COURT IS DISCRETIONARY, AND THE NINTH CIRCUIT DID NOT ABUSE ITS DISCRETION

By Washington statute, federal courts have discretion to certify questions of state law to the Washington Supreme Court. See RCW 2.60.020. Shupe argues that the Ninth Circuit was required to certify his proposed issue to the Washington Supreme Court. Yet, this position ignores Lehman Brothers v. Jacob

Scheir, 416 U.S. 386, 390-91, 94 S. Ct. 1741, 40 L. Ed.2d 215, 220 (1974), where this court stated:

> We do not suggest that where there is doubt as to local law and where the certification procedure is available, resort to it is obligatory. . . . Its use in a given case rests in the sound discretion of the federal courts.

A variety of federal courts have noted that the decision to certify a question of state law is discretionary and will be reversed only where that discretion is abused. See, e.g., Ormsbee Development Co. v. Grace, 668 F.2d 1140, 1149 (10th Cir. 1982) ("Certification is, and must remain, a discretionary function of the federal court, to be utilized, when available, to determine unsettled questions of state law."); Public Citizen, Health Research Group v. Commission on Medical Discipline of Maryland, 573 F.2d 863, 866 (4th Cir. 1978) (District court did not abuse discretion in refusing

request for certification); Farmer v. Travelers Indemnity Co., 539 F.2d 562, 563 (5th Cir. 1976) ("The decision to certify is discretionary with this Court."); State of Florida ex rel Shevin v. Exxon Corp., 526 F.2d 266, 274 (5th Cir. 1976) ("We use much judgment, restraint and discretion in certifying"), quoting Barnes v. Atlantic & Pacific Life Insurance Co. of America, 514 F.2d 704, 705 n.4 (5th Cir. 1975); Imel v. United States, 523 F.2d 853, 857 (10th Cir. 1975) (certification is discretionary).

In his petition, Shupe does not even suggest that the Ninth Circuit abused its discretion by refusing certification. Such a suggestion would be virtually impossible to defend. Of the many factors taken into account upon a request for certification, one consideration is the potential for delay. See State of Florida ex rel. Shevin v. Exxon Corp., 526 F.2d

266, 275 (5th Cir. 1976). In the present case, Shupe asked for certification only after he had lost on the merits before the district and circuit courts. He has offered no reasons for not requesting certification prior to the district court's decision, and no such reasons exist. On this basis alone, the Ninth Circuit was justified in dispensing with Shupe's eleventh hour attempt to resurrect a claim which had been laid to rest after more than two years of litigation. See Lehman Brothers v. Scheir, 416 U.S. 386, 393, 40 L. Ed.2d 215, 221, 94 S. Ct. 1741 (1974) (concurring opinion by Justice Rehnquist) (certification inappropriate where it would upset years of trial and appellate litigation, and where request for certification was made only after losses in both district and circuit courts).

CONCLUSION

In this Petition, Shupe seeks to reopen a claim which he litigated and lost in both the district court and the circuit court of appeals. Shupe argues that the Ninth Circuit should be required to certify an issue of state law to the Washington Supreme Court. Yet, Shupe offers no reason to reverse Lehman Brothers, which holds that such decisions are discretionary. For this reason, and because the proposed issue for certification is not dispositive and was not raised before the district court, Shupe's Petition for Writ of Certiorari should be denied.

DATED this 1st day of November, 1984.

Respectfully submitted,

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